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TIMES ARE CHANGING FOR TRIALS IN COURT*

ROBERT E. KEETON**

I am honored and delighted to have the opportunity to speak on this occasion when we are gathered in tribute to my good friend, Mason Ladd. I came to know Mason Ladd in the 1950s, in the early years of my law teaching. At that time, it seemed to us who knew him that he was at the peak of a distinguished professional career. With the wisdom of hindsight, in the 1990s, we now know that in the 1950s he was only approaching his prime. He reached an even higher peak, of course, in his deanship here at Florida State.

Mason Ladd achieved great distinction as a scholar and teacher of the law of evidence. Also, he had a special interest in practical application of the law of evidence in trial courts. It is altogether fitting that this lecture focus on applying rules of evidence in trial.

I. EPISODES OF PROOF AT TRIAL

I will ask you to think about, and compare, three episodes. Bearing in mind changing technology, I will ask you to think about the first as a snapshot. Think of the second and third as (in current jargon) sound bites. Also, in each instance, rather than making use of slides, screens, tapes, amplifiers, and projectors, I ask you to use your imagination—that is, use your own experience and common sense to fill out details of these bits and bites of courtroom drama as I describe the central features for you. In this way you will understand nuances of these

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* Judge Keeton delivered these remarks at the Mason Ladd Memorial Lecture Series at the Florida State University College of Law, February 11-12, 1993. Mason Ladd (1898-1980), A.B., Grinnell College, 1920; J.D., University of Iowa, 1923; S.J.D., Harvard University, 1935; LL.D., Grinnell College, 1954, was a Dean Emeritus at the Florida State University College of Law and at the University of Iowa.

** Judge Robert E. Keeton was appointed United States District Judge for the District of Massachusetts on March 23, 1979, and entered on duty on April 2, 1979. He is a graduate of the University of Texas (B.B.A. in 1940 and LL.B. in 1941), and Harvard University (S.J.D. in 1956). During World War II, he served in the United States Naval Reserve, 1942-45. He practiced law in Houston, Texas, 1941-42, 1945-51, and taught at Southern Methodist University, Dallas, Texas, 1951-53, and at Harvard University, 1953-79.

He formerly served as a Commissioner on Uniform State Laws in Massachusetts, 1971-79, and as Director of the National Institute for Trial Advocacy, 1973-76. He served on the Judicial Conference Committee on Admission of Attorneys to Federal Practice, 1976-85, and the Committee on Court Administration, 1985-87. He has been a member of the Committee on Rules of Practice and Procedure, 1987-90, and Chairman for a term commencing in 1990.

episodes better than even the best of our current technology could produce for your eyes and ears to perceive. After all, a camera in the courtroom, focused in one place, captures only a little of what the alert advocate observes. A tape, even if more precise in some ways, is less able than the alert trial lawyer to unscramble the clashing voices and capture the nonverbal communications of an emotional courtroom confrontation.

Before I present these three episodes, I have a confession and a claim to make. The confession is that in preparing these descriptions I have come closer to copying than to creativity. A well-timed confession may convert what otherwise might have been plagiarism into acceptable scholarship.

The claim that I make is that everything recreated here has in fact happened. It is true that in producing these three courtroom episodes I have taken a bit of license—combining and adapting, rather than literally reporting. Nevertheless, I am presenting to you things that have in fact occurred in courtrooms in my presence, or in the presence of (in the jargon of criminal procedure) informants who have previously been determined to be reliable.

EPISODE ONE is a snapshot. Think of this as the court reporter's transcript:

Lawyer Able:	Mr. King, when you approached the overturned car in the intersection, did you hear anything?
Lawyer Baker:	I pray Your Honor's judgment on my brother's leading and suggestive question.
Lawyer Able:	If Your Honor please, surely the witness may be allowed to answer "Yes" or "No."
Court:	The witness may answer "Yes" or "No."
Witness:	Yes.
Lawyer Able:	What did you hear?
Lawyer Baker:	Again, I pray Your Honor's judgment.
Lawyer Able:	If Your Honor please, res gestae.
Lawyer Baker:	But, Your Honor, no foundation has been laid.
Court:	Objection sustained. You may inquire further, Mr. Able.

Lawyer Able:	Mr. King, who spoke first when you approached the overturned car?
Witness:	He did [pointing to the plaintiff]—Mr. Hurt.
Lawyer Able:	Describe what you observed about his manner of speaking.
Witness:	He was screaming.
Lawyer Able:	What did he say?
Lawyer Baker:	I pray Your Honor's judgment.
Court:	Objection overruled. The witness may answer.
Witness:	He screamed, "I can't feel my legs! Help me!"
Lawyer Able:	Did he say anything more?
Lawyer Baker:	No foundation, Your Honor.
Court:	Objection sustained.
Lawyer Able:	What happened after he screamed, "I can't feel my legs! Help me!"
Witness:	I said, "What happened to your legs?"
Lawyer Able:	Did he answer?
Witness:	Yes.
Lawyer Able:	What did he say?
Lawyer Baker:	I pray Your Honor's judgment.
Court:	I ask the jury to excuse us while we confer. Counsel may approach the sidebar. [At sidebar] Mr. Able, what is the expected answer?
Lawyer Able:	[At sidebar]: I expect the witness to say that Mr. Hurt said, "I had a green light, and he came through and hit me anyway!" I submit, Your Honor, that what Mr. Hurt said was not really in answer to the question—"What happened to your legs?"—so it is admissible as part of the res gestae.

That's where the snapshot ends. Are you curious about what the judge's ruling was? Or what it should have been? Please forgive me,

but I want to come back to those questions later after we have another episode before us.

(I learned that evasive technique in the courtroom. Sometimes after I ask a question that a lawyer would prefer not to answer, the lawyer says, "Your Honor, if I may, I need to give you some *background* before I answer your question.") ("Background," indeed! A little effort at brainwashing?)

EPISODE TWO is a TV-sound bite. I present it by describing for you, as well as I can, how it would sound and look on the video playback. Use your imagination to fill in details.

Lawyer Clark:	Jim, when you approached Joe Hurt's smashed-up, rolled-over car in the intersection, while Joe was still trapped in it wondering if there would be any Good Samaritan like you around to—
Lawyer Dale:	[Interrupting] I protest against this outrageous argument thinly disguised as a question.
Court:	I take that to be an objection, and I sustain it.
Lawyer Clark:	Note my exception. I'll rephrase the question. Jim, when you approached Joe's—shall we say, "overturned car"—was Joe still inside wondering whether somebody would help him out?
Lawyer Dale:	Objection. It's still an argument. [Turning to opposing counsel] Can't you just ask a question?
Lawyer Clark:	Oh, sorry, I didn't mean to offend my sister.
Juror One:	[*Sotto voce* to Juror Two] Are they really brother and sister?
Juror Two:	[*Sotto voce* to Juror One] I don't really know, but they sure scrap like it.
Lawyer Clark:	What's your answer, Joe?
Lawyer Dale:	Your Honor, may I have a ruling on my objection?

Court: Well, now, Little Lady, we should give Mr. Clark a reasonable amount of leeway in framing his own questions.

Lawyer Dale: Your Honor, I respectfully object to the way you are addressing the members of the Bar before you.

Court: I'm sorry if I have offended you. I was just trying to be gentlemanly and courteous to you as a lady at the Bar of this court. Are you going to object to that?

Lawyer Dale: Of course not, Your Honor. I don't mind your calling *me* Little Lady so long as you call *him* Little Man.

(If we had allowed a camera in the courtroom, very likely the video display at this point would be focused on the witness, who appears to be suppressing a thin and somewhat nervous smile. The audio carries background noise that might be interpreted as tittering in the jury box. Overriding the tittering is the Judge's voice.)

Court: All right. Let's get on with the trial. I sustain the objection to the last question. Proceed.

Lawyer Clark: When you approached Joe's overturned car, did you hear Joe say anything? Just "Yes" or "No."

Witness: Yes.

Lawyer Clark: Tell us, as nearly in the exact words as you can remember, whatever he said.

Lawyer Dale: Objection, hearsay, and no foundation has been laid for any exception.

Court: Overruled. The witness may answer.

Witness: He said, "I can't feel my legs! Help me!" And I asked him what he meant, and he—

Lawyer Dale: [Interrupting] Objection, Your Honor, because—

Court: [Interrupting] Overruled. Complete your answer.

Witness: Judge, is it all right for me to say the words he used? I don't want to be—

Judge:	[Interrupting.] Just do your best to repeat the exact words as near as you can.
Witness:	Well, he said, "I had a green light all the way and that—." Judge, I think I'd better blip a couple of words—"that so-and-so came through like a bat out of hell and smashed into me anyway."
Lawyer Dale:	Objection. Move to strike.
Court:	I don't think I need strike it just because the witness is uncomfortable using the exact words.
Lawyer Dale:	That's not my objection, Your Honor. There was no spontaneous utterance. Instead, the declarant was responding to a question.
Court:	I see your point. The objection is sustained.
Lawyer Clark:	Judge, the jury should hear evidence about Joe's excited statement. In his excitement he spoke the truth when he said he had the green light. It's up to the jury to find the facts.
Lawyer Dale:	They've now just heard twice the objectionable and incorrect statement of counsel, Your Honor. I press again my motion to strike, and I ask you to instruct the jury to disregard both the answer of the witness and counsel's deliberately inaccurate and prejudicial statement about what the witness said.
Lawyer Clark:	I object to her making false accusations against me. Judge, I just ask you to let the jury decide who's being fair and who's trying to hide things from the jury.
Lawyer Dale:	I protest, Your Honor—.
Court:	[Interrupting] Enough, enough! The evidence is excluded. The jury will disregard it. Next question.

Before I go to Episode Three, let us pause to compare Episodes One and Two.

First, I ask you to fix in your own mind one or more decades of the twentieth century in which Episode One could have occurred, and

where. Then fix in your mind one or more decades of the twentieth century in which Episode Two could have occurred, and where. To what extent do you think the difference between these two episodes was the product of the difference in places where they occurred, or of the difference in decades and of changes of the legal system and the professional culture that occurred between the decade of Episode One and the decade of Episode Two?

The quite civil behavior, in Episode One, of both lawyers toward the judge and toward each other was characteristic of conduct in most courtrooms around the country in the decade of the 1950s. "I pray Your Honor's judgment," and speaking of fellow members of the Bar as "my brother" was more common, perhaps, in New England than in other sections of the country; but, civility in general prevailed throughout the nation, at least in the principal trial courts, state and federal.

Of course, there were few women at the Bar in the 1950s and earlier decades, and in Massachusetts the conversion from "my brother" to "my sister" has produced its own side effects, especially when an attorney from outside the state is surprised and understandably suspicious about whether she is being discriminated against by being called "my sister."

The historical courtroom events from which I borrowed in constructing Episode One occurred in state and federal courtrooms in Massachusetts. The historical courtroom event that I adapted to construct Episode Two occurred in a Texas courtroom. But a recent study of gender discrimination in courts, commissioned by the Supreme Judicial Court of Massachusetts, provided ample evidence to support an inference that insensitivity similar to that of the judge in Episode Two could have been observed in some Massachusetts courtrooms.

A third comparison I invite you to consider concerns the amount of time taken to come to a ruling on the admissibility of evidence. Your first reaction to incivility may be that we should be more concerned about fair trial and just disposition than about courtroom manners. The point I ask you to consider is that the contrast between Episodes One and Two illustrates the reality that incivility in the courtroom exacts, at a minimum, a substantial price in ways other than mere departure from good manners. Incivility almost inevitably translates into longer and more expensive trials. Also, when trials are longer and more expensive because of incivility, the added length is very unlikely to contribute anything at all to making the trial a better instrument for delivering justice. It is far more likely that delays and distractions will be an impediment to fair trial. The incivility and length of the

trial will make it harder for the judge and jury to understand the dispute well and reach a wise and fair decision.

Now, how do you feel about the judges' rulings? Both of these judges ruled that the jury should hear and consider the first statement made by the victim but not the response to the question, "What happened?" or "What happened to your legs?" whichever version is to be credited.

How would you answer the following questions: First: Must the judge consider whether he or she believes the witness is telling the truth in order to decide whether the statement was, in the words of Rule 803(2) of the Federal Rules of Evidence, "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"? Whatever your answer may be to the preliminary question just stated, how do you answer this second question: Should the judge rule that the jury may hear and consider the testimony of this witness about the two statements the witness says he heard the victim make?

Before asking you to answer, I will propose to you your role. You are a law clerk for a trial judge who is lucky enough to have a law clerk. The judge for whom you are clerking says to you:

> Listen, I'm happy to have your advice about my options, but more than that, I want you to tell me how you would rule if you were the judge. I have read a book called *Judging*, written by a federal trial judge up in Boston. I don't agree with everything he says in that book, but I do agree with the very first sentence in the book: "Judging is choice." The arguments of the lawyers about what my choice should be are a great help. They keep me from seeing just one side of a matter and overlooking other things. But lawyers don't have to agonize over the choice—they just make the best arguments for their own clients. I want the advice of somebody who is uncommitted to either side and will agonize along with me over what is the best "choice."

That ends the instructions about what your trial judge believes about judging, and what she wants you to believe and do in your role as her law clerk. That means, of course, that if you want to keep your job as her law clerk, you cannot abstain when she says, "Which way would you rule?"

All right, which way would you rule? Do you let the jury hear and consider the first statement—"I can't feel my legs! Help me!"?

If Yes, raise your hand. [Rough count]

If No, raise your hand. [Rough count]

Do you let the jury hear and consider the second statement—I'll use the sanitized form—"I had a green light, and he came through and hit me anyway"?

If Yes, raise your hand. [Rough count]

If No, raise your hand. [Rough count]

I have called on you to use your imagination several times. Please do it once more. Switch the scene to the appellate court, a year or so later. The jury apparently thought both drivers were cheating a little on the traffic light as it was changing, each without seeing the other. The jury found both parties negligent. The party against whom the trial judge ruled on the second of these evidence questions challenges that ruling. What is the appellate court's decision?

Now, instead of taking the role of an appellate judge or law clerk to an appellate judge, be a professor of law who teaches law students about how appellate courts behave. Do you predict affirmance or reversal?

If affirmance, raise your hand. [Rough count]

If reversal, raise your hand. [Rough count]

A commonly repeated observation about appellate decision making is this: Most appellate opinions on evidence questions say:

> Affirmed. The issue was one on which the trial judge had discretion. (That is, choice.) We cannot say the trial judge's ruling was clearly erroneous or, for any other reason, an abuse of discretion.

EPISODE THREE

Lawyer Earl:	Jimmy, please tell the jury whether or not you were the first person to reach Joe's car just after it stopped rolling over in the intersection.
Witness:	I was.
Lawyer Earl:	Could you see anybody in it?
Witness:	I couldn't *see* him, but I *heard* him.
Lawyer Earl:	What did he say?
Lawyer Frank:	Your Honor, may the circumstances be shown first so there is a foundation for determining whether the out-of-court statement should be received?
Court:	Yes. I sustain the objection.
Lawyer Earl:	Without telling us the words you heard, describe what, if anything, you observed about the manner in which they were spoken.

Witness:	He was screaming.
Lawyer Earl:	What did he say?
Witness:	He said, "I can't feel my legs! Help me!" And I said, "What happened?" And—
Lawyer Earl:	[Interrupting] Was that your full question or was there more to it?
Witness:	I don't understand.
Lawyer Earl:	Would it refresh your memory if I asked whether you said—
Lawyer Frank:	[Interrupting] Objection, Your Honor.
Court:	Sustained.
Lawyer Earl:	What did Joe say in answer to your question about what happened to his legs?
Lawyer Frank:	Objection, Your Honor.
Court:	Sustained.
Lawyer Earl:	May I be heard, Your Honor.
Court:	Yes, please come to the sidebar. [At sidebar] What is the expected answer, Ms. Earl?
Lawyer Earl:	[At sidebar] Your Honor, my sister is trying to keep the jury from hearing a statement that is plainly an excited utterance. The colorful language of the out-of-court utterance will reinforce my point, if the witness will reproduce it faithfully. But I'll leave out the color for the moment, because the witness may be uncomfortable about that and I don't know how he'll answer. In substance, however, I expect him to testify that Joe said, "I had a green light, and he came through and hit me anyway."
Lawyer Frank:	[At sidebar] Your Honor, my objection was to my sister's effort to lead the witness into changing his testimony, about his own question, from "What happened?" to "What happened to your legs?" It may seem to be a small point, but she wants to be able to argue to you and to the jury that this statement was nonresponsive to the question this witness asked and for that reason should be treated as an excited utterance.

Court: [At sidebar] First, I commend both of you for fully complying with my ground rule that you address all your remarks to me and not direct comments toward each other. But, Ms. Earl, you violated two among the other ground rules of this court, a copy of which the clerk handed to you before the beginning of this trial. Had you not violated the ground rules, the question of admissibility of the second statement might have been a close question. But I'm clear I should exclude it now because of these violations. First, you made a deliberate choice to lead your own witness, without my permission, on a matter as to which there is no reasonable basis for your believing I would have allowed a leading question. Second, when asking a question purportedly to refresh recollection, you were stating the content in the presence of the jury. If the witness does not accept your suggestion, I must tell the jury to disregard something they have heard you say. As I explained to the jury in my opening instructions, in your presence, letting the jury hear something and then telling them to disregard it makes their job harder. The ground rules are designed to keep that kind of thing to a minimum—to help us have a completely fair trial. So, as a sanction for the violation of the ground rules, I resolve the close question of admissibility against you. The testimony of this witness about the response of the out-of-court declarant to his question is excluded.

Unlike Episodes One and Two, Episode Three, in all of its precise details, could not have occurred in any courtroom up to this time, as far as I am aware. The reason is that I know of no trial judge whose practice is to deliver to lawyers, at or before the beginning of a trial, a set of ground rules about examination of witnesses that includes all the ground rules to which this hypothetical judge referred.

I do know one judge who right now is seriously considering adopting that practice. Also, I know many trial judges—most, if not all of them, in fact—who have tendencies and practices about the way they

rule on recurring situations in the courtroom. Those tendencies and practices operate almost like ground rules—or "standing O's." In this context, "standing O's" means "standing orders," not "standing ovations."

When an able lawyer says of a trial judge, "He has many standing O's," it is a dubious compliment, at best. Observable tendencies of a trial judge concerning that judge's rulings on matters of proof, like "standing O's," have all the objectionable characteristics of unpublished rules.

II. Stresses on Traditional Ways of Administering Justice

A. An Introduction

Thus far we have focused on "nuts and bolts"—details of how lawyers and judges behave in applying evidence rules on one kind of evidence. Now I ask you to shift your mental gears and think about the "big picture." The reason I started this way is that I believe we do better thinking about the big picture if we keep reminding ourselves that any plans we develop to improve the "big picture" need to take account of how the plans will work in the "nuts and bolts" situations.

Thus, I have placed three episodes before you in the hope that thinking about them will help us to think in a very pragmatic as well as a more theoretical way about current stresses on the traditional adversary system that Episodes Two and Three illustrate.

In describing these stresses, I will borrow again—but this time I borrow, as the American Bar Association (ABA) graciously allows me to do, from my own remarks as participant in one among the many sessions held by different segments of the ABA at the annual meeting in August of 1992. The subject of the particular session was "Evaluating Our System of Justice: Is Our Judicial and Litigation System Delivering Justice to All of the Public?"

My assigned topic was "Tensions Between Litigants and Decisionmakers (The Values and Costs of Advocacy and Professionalism)." For the next few pages, I will often be quoting or paraphrasing.

I ask you to evaluate our system of doing justice from a particular perspective. The perspective I suggest is one that may be uncomfortable, as well as unfamiliar. It is a perspective that focuses on how we try the cases that we do try in the system.

B. Models of Advocacy

Are we delivering justice in these cases? For centuries now, our aim has been to deliver justice through what we call an adversary system. How well is the system working today?

Our theory is that the adversary system works well because good advocates inform good judges of all the things they need to consider in order to make wise and fair decisions—wise and fair choices about rulings during trial, and wise and fair judgments at the end of the whole process.

Different models of advocacy make different contributions to the administration of justice, create different risks of injustice, and impose different costs on the parties and on the public. Consider first the traditional model of the adversary system. It is described in general in the Canons of Ethics of the American Bar Association, fashioned almost 100 years ago. In this model, lawyers are professionals, zealously representing their clients as officers of the court, civil in demeanor and courteous and respectful in manner to everyone in the courtroom, including the lying witness who is being destroyed by incisive cross-examination. The primary reason that model worked was not that unforgiving judges were rigorously enforcing precise and detailed rules of procedure and evidence. Instead, professionalism, deeply entrenched in the legal culture, powerfully reinforced professional behavior in every advocate and every judge.

That model operates in its pristine form in very few courts today. Many very different forms of the adversary system are in use in the different state and federal courts around the country. One thing, however, is common to all of them. Advocacy tends to be today more zealous, often more excessively zealous, and less civil than it was under that traditional model. Both the practicing lawyer and the trial judge who believe in professionalism have less support in contemporary mores. To achieve their aim of civil proceedings, they must depend more on invoking and enforcing rules. The trial judge must be alert and ready to step in and control excesses of advocacy. Without that control, fairness is sacrificed. With that control comes would-be impairment of the freedom not only of the would-be offenders, but as well of the advocate who would practice civility if mutual civility were the consistent order of the day.

C. Stresses Over Choosing a Model of Advocacy

In any jurisdiction and any court where adherence to the traditional model has waned, someone in a position of authority must make a choice among the many models of advocacy that remain as viable alternatives. If the choice has not been mandated more generally by those sets of decisionmakers who enact statutes and promulgate rules of procedure and rules of discipline, choices will be made by the interaction of the trial lawyers and the trial judge, case by case.

A necessity of choosing among models of advocacy creates tension between litigants and decisionmakers. A litigant who focuses on the litigant's own immediate interests in the outcome of a particular case is likely to favor more freedom for his or her own advocate. That interest pushes beyond zeal toward excesses of advocacy. The decisionmaker who focuses on longer-term interests, on fairness to all litigants in all cases, will favor some form of effective control over excesses. The tension is more complex, of course, than just this conflict between litigant interest and system interest. Champions of litigant interest differ among themselves, and so do champions of system interest. Adding to the complexity is the fact that each person who enters this contest is likely to claim to be a champion of the ideal balance between litigant and system interest.

To think more concretely about that balance for the present and future, we need to think about the fundamental nature of disputes in the present and future and how they compare with the disputes of the past out of which this traditional model of advocacy developed.

D. Economic, Social, and Political Challenges to Justice

Recent and predictable future economic, social, and political developments present dramatically different challenges to our justice system from those of the past. Justice Kennedy recently reminded us of this fact in his concurring opinion in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2146 (1992), in which he put the point succinctly: "Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission . . . or Ogden seeking an injunction to halt Gibbons' steamboat operations."

Economic relationships are less and less local in nature, more regional, national, and international in nature, and more complex. This is true of economic relationships among individuals, corporate entities, and governmental entities to the extent that governmental entities either engage in economic activity or regulate economic activity. Also, although the social and political realities of our times still involve many strictly local relationships, more and more of the relationships relevant to disputes in our courts are regional, national, and international. And all the relationships, from local to international, are more complex. The disputes that arise from all these relationships are both more numerous and more complex. Moreover, numerosity and complexity have increased and will increase more dramatically than merely in proportion to population increases.

All these changes produce new challenges for our system of justice. These new challenges in turn increase the tensions between the liti-

gants and decisionmakers that are inherent in any adversary system of adjudication.

III. Responses to the Changing Nature of Disputes and Disputing

How have we responded to these challenges? Look to the marketplace. Law book publishers, advertising of books and journals on trial advocacy, tell the trial advocate today: "You will face hardball attorneys, machiavellian litigators, intimidators, attorneys whose stock and trade is to adopt any new tactical low (I am quoting from the advertisements) short of certain cause for disbarment. They bully witnesses and bully judges if they can get away with it." Advertisements of this same style tell you the new books and journals they are trying to sell will help you develop counter-hardball strategies.

I am not sure that the availability of these books is good news even for trial lawyers, much less their clients. But if it is bad news for trial lawyers as well as their clients, here is some good news for good trial lawyers and their good clients. These same advertisements tell you that judges are increasingly ready today to deal harshly with your opponent's hardball tactics. Your job is to help the judge fashion effective ways of taking away from your opponents every benefit of hardball tactics, and adding on punishment for good measure.

Now, even though this is surely good news for good lawyers, I do not regard it as good news for good judges or for the public. The message appears to be that the remedy for hardball is more hardball—hardball judges to control and punish hardball lawyers. I believe judges in general have neither the time, the resources, nor the will to undertake this responsibility. There is surely a better way to rescue the adversary system from the abusers. In short, because of dramatic changes in the types of cases before the courts, in the caseload of the courts, and in the funding for the third branch in both state and federal courts, we face an inevitable choice. That necessity of choice is in part also a challenge and an opportunity.

Will litigation in the decade immediately ahead of us and in the years beyond become a twentieth century Roman circus with Rambo litigators as the gladiators and a Terminator as judge? Will we have judges who just signal "thumbs up" or "thumbs down," knowing that the termination of egregiously expensive litigation may also be the termination of the very economic existence of a losing party, or at least a workout through bankruptcy? The heavy caseload compared with limited resources tells the judge urgently, "just terminate—don't worry so long and so much about terminating justly."

If the official administration of justice is allowed to move more and more toward Rambo litigators and Terminator judges, must we also develop an alternative, perhaps Ninja Turtles, who operate an Alternative Dispute Resolution (ADR) system in which the key "good guy" participants are freed of the constraints of law and rules and threats of appeals and new trials—freed, in short, of all of the threats under which advocates and judges must function in the official system?

Acknowledging all the values and benefits of ADR, I believe we should also have a better official model for the administration of justice. There is a better choice. Essential to that better choice is a unified and widely supported response from all branches of the legal profession—the Bar, the Bench, and the Academy.

That kind of unity and cooperation is essential to maintaining a system of justice aimed, as stated in Rule 1 of the Federal Rules of Civil Procedure, at just, speedy, and inexpensive determination of every action. Acting together we must find ways to (1) identify and control excesses of advocacy that do more to impede than to aid just outcomes, and (2) identify and foster models of professional advocacy that inform decisionmakers and contribute to wise and fair decisions. A better way must include at least four elements.

First, educating judges and lawyers in the skills and methods of better, more effective practice—educating them about how to deal effectively with the exceptional deviations from acceptable practice.

Second, developing improved rules and procedures that are well adapted to twenty-first century litigation, much of which will be dramatically different from the kinds of cases before the courts when Weaver sued Ward[1] or when, a few centuries later, Hadley sued Baxendale[2] across the other side of the Atlantic, or Vosberg sued Putney[3] over here.

Third, developing a professional culture that encourages skilled advocacy and discourages Rambo tactics. By professional culture, I mean a widely shared expectation about what is and what is not permissible, shared in all three branches of the profession—the Bar, the Academy, and the Bench—and overwhelmingly reinforced by practices consistent with the shared expectations.

Fourth, reinforcing the independence and quality of the third branch. Of course, this fourth prerequisite is essential to the administration of justice, for deeper reasons than just its impact on the adversary system. Independence of the third branch is essential to the

1. 80 Eng. Rep. 284 (K.B. 1616).
2. 9 Ex. 341, 156 Eng. Rep. 145 (1854).
3. 80 Wis. 523, 50 N.W. 403 (1891).

preservation of government by law rather than government according to the views of the men and women who have the power to make decisions, including those who resolve particular disputes in the administration of justice.

IV. A First Step

"Times Are Changing" for trials in court in many senses and in many ways. I emphasize three at the moment. First, current caseloads in the courts are materially different in ways that bear upon stresses on the traditional adversary system. Second, professional standards and practices are different and more varied. Third, the *amount* of time we now use in the average trial differs in multiples, not just small percentages, from the time used in the average trial of three or more decades ago. We must explore ways of keeping our trials shorter and less expensive. If we do not, we will allow the adversary system to slide into less usefulness to the community we serve, and less use by that community.

As a first step toward exploring ways of preserving the key advantages of jury trials and the adversary system while at the same time making trials shorter and better than they have become in the last two or three decades, I propose that we think about a procedure that can only work in a case through the cooperation of the trial judge and the trial lawyers. This is a kind of cooperation that the trial lawyers can give without sacrificing client interests. I will call this proposed procedure a "Stipulated Short Trial."

To help you think about this proposal in more depth, I have drafted an illustrative "Order Regulating Jury Trial." It places restrictions on modes of examining witnesses. Also, it places modest illustrative time limits on the parties. More significantly, it provides a framework and a nudge encouraging the parties to stipulate to an even shorter trial than a judge could, in my view, properly order over objection. The objective, however, is not just that the trial be shorter. The objective is that the trial be better in quality as well as speedier and less expensive. The published version of this lecture will include a full draft of such an order.[4] Here I quote just a few of its key provisions:

> 13. The objection of interrogating counsel to an answer that is nonresponsive will usually be sustained. Objections by other counsel solely on the ground that an answer is nonresponsive will usually be overruled. Sustaining such an objection is likely to lead to a new

4. *See* Appendix, *infra* page 20.

question that elicits exactly the same information as was stated in the struck answer, and time is wasted. Of course, if some other valid ground of objection is added, a statement that the answer was nonresponsive may be needed and appropriate to explain why no objection was made to the question.

14. The court will not instruct a witness to "answer YES or NO" to (1) a multiple question, (2) a question that requires the witness to make or accept an inference or characterization rather than merely acknowledging or denying an observable fact, or (3) a question that is argumentative in form or in substance.

15. Questions framed to have more impact as arguments than as requests for testimony that the witness is competent to give are out of bounds. They will be excluded on objection and may be excluded on the court's initiative, without objection.

16. Ordinarily, questions asking one witness to comment on the credibility of another are out of bounds. A lawyer who wishes to ask such a question must make a request out of the presence of the jury for leave to do so.

. . .

VI. TIME LIMITS

These provisions regarding Time Limits apply only if the court specifically so orders. The other provisions of this Order Regulating Jury Trial ordinarily assure a trial of reasonable length. The court expects to invoke Part VI only if finding it likely that the trial would be longer than two court days without these provisions.

1. Time limits provide an incentive to make the best possible use of the limited time allowed. If the court finds a need for time limits and the parties are not able to agree upon what the limits will be, the court, after inviting submissions from the parties, will order presumptive limits, which will be subject to modification for good cause shown. Plainly, however, the limits that the court may order will not be as stringent as those the parties might agree would serve their mutual interests in achieving a shorter, less expensive, and better quality trial.

2. Absent agreement of the parties to time limits that are approved by the court, the court will order a presumptive limit of a specified number of hours for this trial, to be allocated equally between opposing parties (or groups of aligned parties) unless otherwise ordered for good cause.

3. A request for added time will be allowed only for good cause. An explicit purpose of this provision is to create an incentive for using time exclusively on issues material to disposition on the merits.

4. In determining whether to allow a motion of any party for an increased allotment of time, the court will take into account (a) whether or not that party has used the time from commencement of trial forward in a reasonable and proper way, in compliance with all

orders regulating the trial, (b) the party's proffer with respect to the way in which the added time requested would be used and why it is essential to fair trial, and (c) any other facts the party may wish to present in support of the motion, if determined by the court to be material. The court will be receptive to motions for reducing or increasing allotted time to assure that allotments are fair among the parties and adequate for developing the evidence. Any party that makes only proper use of its time throughout the trial is assured that an extension will be allowed if more time is needed to present all its material and admissible evidence adequately.

5. Presumptive allotments of time to a party will be stated as a total number of hours available to that party, rather than allocations of times for particular witnesses or proceedings. Thus, each party will be free, without a showing of good cause, to allocate time as that party chooses among different uses—opening statement, direct and cross-examination of various witnesses, closing argument, objections, and motions—as long as the party's total allotment is not exceeded.

6. Time taken to argue objections will be charged against the time allocation of the party against whom the court rules, and will be allocated between parties if the court rules partly for and partly against the objecting party.

I come at the end to emphasizing two points: One: There is a sense in which we have long been working on the problems of improving our system of justice. From another perspective, however, focusing sharply on how we try cases, we have barely begun to respond to the special challenges we face today and will face in the twenty-first century.

Two: The choice between sliding into an excessively adversary system and affirmatively developing a better system adapted to the needs and realities of the twenty-first century is not a choice to be left to fate or just to events as they may unfold. The profession has an opportunity to make a better choice. We have the option of a cooperative venture in doing justice, one in which all branches of the profession participate actively. The choice is one that cannot be made at a single moment. It requires continued action over time, but the action does have to commence sometime. Now is a good time.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

	)	CIVIL ACTION
	)	NO.
Plaintiff	)	
	)	
v.	)	
	)	
	)	
Defendant	)	
	)	
	)	

Tentative Draft 2/8/93
Order Regulating Jury Trial

I. Important Dates

FINAL PRETRIAL CONFERENCE DATE. _____ m., _____ , 19 ____ (FPTC DATE).
TRIAL DATE. ____ m., _____ , 19 ____ (TRIAL DATE).
The court usually determines the TRIAL DATE during the Final Pretrial Conference and sets the trial for a Monday within 14 to 28 DAYS from the FPTC date.
OTHER IMPORTANT DATES. If blanks are not filled in, these dates are fixed at the bracketed time before or after the TRIAL DATE.

OTHER IMPORTANT DATES:

[*TWO* WEEKS] before the TRIAL DATE/ _____ , 19 ____
[If Part VI applies, see VI.7, VI.8]

[*ONE* WEEK] before the TRIAL DATE/ _____ , 19 ____
[If Part VI applies, see VI.8]

[TWO COURT DAYS] before the TRIAL DATE/ _____ , 19 ____
See Parts II.5, III.1, IV.A.2, IV.B.1.(b), V.A.2, V.B.1

TWO COURT DAYS before EACH DAY OF TRIAL

See Part V.B.1

BEFORE TRIAL COMMENCES
See Part V.B.1

[FIRST TUESDAY AFTER] TRIAL DATE/ _____ , 19 ____
[If Part VII applies, see VII]

DAILY DURING TRIAL
See Parts V.B.5,, V.B 11, V.E.1

II. Aims, Incentives, and Stipulations

1. The central aim of this Order is to create a set of procedures tailored to fit the distinctive characteristics of this case and "to secure the just, speedy, and inexpensive determination of [this] action." Fed. R. Civ. Pro. 1.

2. Absent planning and an explicit understanding among counsel and the court about methods of proof, interrogation, and argument that will or will not be used, each advocate has an incentive toward extremely adversarial strategies and tactics. Of course, lawyers as well as judges know that extreme adversariness has its own downside risks. We also know, however, that pressures to respond in kind to contentious techniques used against you are hard to resist. Thus, when counsel expect that the court will allow excessive adversariness, the length and cost of the trial tend to increase. Distracting disputes over tangential matters interfere with the court's and the jury's understanding of material issues. The quality of the trial deteriorates.

3. When counsel and the court plan in advance to adapt the trial procedures to the needs of the particular case, the trial is likely to be shorter and less expensive to the parties and to the public than it otherwise would be. Of even greater significance, the trial is likely to be better in quality. A crisp, well-focused trial helps the court and jury understand fully the material disputes of fact and law. The result is more likely to be a wise and fair decision on the merits.

4. By entering this Order Regulating Jury Trial, the court gives notice regarding rules of proof, interrogation, and procedure it expects to apply in the absence of stipulation and invites the parties to suggest modifications and additions to Parts III-V (and Parts VI-VII, if applicable) of this ORDER that may more effectively tailor this trial to the needs of this case. The court encourages stipulations that will serve the aim that:

> "the mode and order of interrogating witnesses and presenting evidence" be such as will "(1) make the interrogation and

> presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Fed. R. Evid. 611(a). The kinds of agreements worthy of consideration include: (a) stipulations that the direct testimony of some or all witnesses will be taken in narrative or affidavit form (with rights of cross-examination reserved) rather than "orally in open court," as is the right of each party under Federal Rule of Civil Procedure 43(a), absent stipulation; and (b) stipulations that evidence in affidavit form will be read to the jury by the witness, or by counsel or another reader with court approval.

(Also, if the court decides to apply time limits to this case (Part VI of this Order), the court encourages counsel and the parties to consider a stipulation for shorter time limits than the court would otherwise impose.)

5. The court does not press parties to settle a case that they genuinely prefer to try. If, however, this is a case destined for settlement, it is in the mutual interest of the parties, as well as in the public interest, that it be settled before the parties incur the expenses of final preparations for the trial. Under this ORDER, and Local Rules of this court, intensified preparations commence, at the latest, several weeks before the FINAL PRETRIAL CONFERENCE DATE. If the case is not settled by that time, the parties and counsel are expected to make good faith efforts to determine finally whether the case can be settled *not later than TWO COURT DAYS before the TRIAL DATE*. These instructions do *not* mean that the court discourages continued efforts to settle a case *even after the jury has been selected*. The court recognizes that developments in trial, beginning with party assessments of the composition of the jury, may affect demands and offers. The point the court emphasizes is that a settlement that occurs in the brief period of two court days before jury selection is to commence is clear evidence that the parties and their attorneys have deferred serious efforts to settle, with insensitivity to the waste of public and private resources and to the delay and inconvenience that their deferring serious negotiations has caused to the parties, witnesses, and attorneys in other cases, as well as to the court.

III. Jury Selection

1. Not later than TWO COURT DAYS before the TRIAL DATE, the parties must file a list of any other persons, not appearing on the witness lists, who should be identified in voir dire questions to the jury. The list must be over-inclusive rather than under-inclusive in

case of any doubt, in order to avoid risks of loss of jurors during trial because of acquaintance with a person whose possible relationship to the case was not made known during voir dire.

2. A jury of eight (8) will be selected unless the parties stipulate otherwise, with court approval.

3. It is the regular practice in this court to call a jury pool on Monday, or on Tuesday when Monday is a holiday. Jury selection in one or more other cases may be scheduled for the same TRIAL DATE.

IV. Proposed Jury Instructions

A. Preliminary and Interim Instructions

1. Before testimony begins, the court will instruct the jury on the functions and roles of the jury and of counsel in the case and on the jury's obligations to decide the case solely on the evidence presented, to refrain from discussing the case (with each other or anyone else), and to avoid contact with the parties and with published or broadcast accounts of the trial.

2. The court may also give preliminary instructions *on the law applicable to the claims and defenses in this case.* The court will offer the parties an opportunity to be heard before giving preliminary instructions of this kind. Any requests of the parties for preliminary instructions must be filed with the court *not later than TWO COURT DAYS before the TRIAL DATE.*

3. If the trial lasts longer than one (1) week and the circumstances warrant, the court may give interim instructions from time to time to help the jury understand the proceedings.

B. Final Jury Instructions

1. The court will give the final jury charge orally and ordinarily will also deliver a copy to the jury in writing. The charge will consist of four components:

(a) General Instructions: General Instructions serve as a guide to the jury throughout its deliberations. A draft of the court's proposed general instructions will be distributed in advance. Any objections or proposed amendments must be filed on or before a date to be specified during trial. (_____, 19____).

(b) Special Interrogatories: The court does not expect to ask the jury to return a general verdict. Special interrogatories request the jury's findings on specific questions of fact. Initial requests for questions to be included in the Verdict Form must be served and filed *not later than TWO COURT DAYS before the TRIAL DATE.*

(c) Explanatory Instructions on the Law: Most of the Explanatory Instructions on the Law bear directly upon an identified question or questions submitted in the special interrogatories on the Verdict Form. Ordinarily the court explains only those rules of law the jury needs to understand to answer the interrogatories. The court does not give, along with interrogatories, the type of instructions that are needed when the jury is to return a general verdict.

(d) Limiting Instructions: Limiting Instructions may include instructions as to evidence received for a limited purpose or purposes, or against less than all the parties in the action. If the occasion for a limiting instruction can be anticipated, parties will be expected to have their requests prepared in advance in writing. If any evidence is received for a limited purpose, a party seeking the benefit of a limiting instruction in the court's final instructions will have the burden of assuring that a copy of the court's oral instruction is delivered to the Clerk for inclusion in the final charge, and in the case of documentary evidence, for attachment to the exhibit. A form that may be used with exhibits is attached to this order as "Exhibit A."

C. Jury Deliberation

Unless a stipulation to the contrary is filed, the Verdict must be unanimous. (The court encourages the parties to stipulate before jury selection that if excuses reduce the jury to a number not less than five (5), the remaining jurors will constitute the jury and will deliberate.)

V. Procedure at Trial

A. Opening Statements

1. Opening statement by the plaintiff will occur promptly after jury selection, on the TRIAL DATE, unless proceedings in another case have priority on that date.

2. Opening statement by the defendant will occur immediately after plaintiff's opening statement, unless defendant has elected otherwise by notice filed and served not later than TWO DAYS before the TRIAL DATE.

3. In a lengthy trial, the court may allow Interim Statements from time to time to enable counsel to clarify issues for the jury.

B. Evidence

1. Each party must give advance notice to the court and the other parties, before jury selection, of the identity of all witnesses whose

testimony (by affidavit, be deposition, or by oral testimony in trial) it may offer during trial. *Not later than TWO COURT DAYS before* it seeks to use the testimony of any witness, or on shorter notice for good cause shown, it must advise the court and all other parties of its intent to use the testimony of the witness on the specified day. Except for good cause shown, no party will be allowed to use the testimony of a witness other than the witnesses already listed on the filings with the court before the trial commences. Except for good cause shown, no party may introduce during direct examination documentary evidence other than those exhibits already listed with the court and furnished to the other parties before trial commences. These provisions with regard to documentary evidence do not apply to cross-examination.

2. Absent a showing of good cause, the court will not exercise its discretion under Federal Rule of Evidence 611(b) to allow the subject matter of the cross-examination to extend beyond the subject matter of the direct examination and matters affecting the credibility of the witness. A showing of good cause will also be required if the subject matter of the redirect is to be allowed to extend beyond matters covered on cross-examination. That a witness has come from a distance or will be unavailable later in the trial may be found to constitute good cause to allow a party to treat him or her as its witness during what would otherwise be cross-examination, and to extend the examination beyond the scope of direct. *Absent a showing of special cause, examination of a witness must not proceed beyond one redirect and one re-cross.*

3. Use of Depositions at Trial: Except for good cause shown, no deposition testimony nay be introduced as direct examination, or during oral direct examination, other than those pages or portions thereof noted in previous filings with the court. This limitation does not apply to the use of deposition testimony in cross-examination.

4. Stipulations may be read at any time, unless otherwise ordered in a particular instance upon a showing of good cause.

5. At least one-half hour before commencement of trial each day, counsel must furnish the court reporter with a copy of any document from which counsel intends to read that day, except depositions to be read by two people in question and answer form. Documents to be used during cross-examination are excepted.

6. Whenever a single person is reading deposition testimony, in order to enable jurors and the reporter to understand clearly, the reader must say "Question" before each question is read and "Answer" before each answer is read.

7. All documents or other non-testimonial evidence that will be admitted against at least one party without objection must be pre-marked as *numbered* exhibits. To effect the pre-marking and to avoid duplicative numbering, each of the parties must assign consecutive numbers to these documents as follows: Plaintiff, 1-500; Defendant, 501-999. *The term "Exhibits" must be used only* for documents or objects that are to be received without objection or have been received in evidence over objection.

8. The term "Marked Items" must be used for documents and other items, referred to in the proceedings, that are not Exhibits. A lettering system must be used by each of the parties to pre-mark as "Marked Items," for identification purposes, each piece of non-testimonial evidence it will offer to which objection has been made by the party against whom the document is sought to be admitted. The Clerk will supply the parties with stickers to be used in pre-marking documents and other non-testimonial evidence, either as agreed Exhibits or, for identification purposes, as Marked Items.

9. Counsel have the court's permission at all times to interrupt proceedings merely to object or move to strike. Counsel need not state the ground(s) of objection unless the court asks for the ground(s), but counsel may without invitation by the court state the ground(s) merely by reference to a Rule designated by number, among the Federal Rules of Evidence. Also, unless otherwise ordered (as may be done, for example, when the court interrupts to sustain an objection because there are obvious, valid grounds), counsel may state the ground(s) in customary legal jargon (e.g., "hearsay," "irrelevant," "lack of essential foundation"). Counsel must not go beyond a bare statement of the ground(s); supporting or opposing arguments must not be stated in the hearing of the jury without the court's permission.

10. Offers of proof will ordinarily be received only after the jury has been excused for a recess or for the day.

11. Conferences out of the hearing of the jury will be held to a minimum. *They will never occur at the beginning of a court day unless that timing is unavoidable.* When the court has directed jurors to be present at a designated hour, counsel asking for a conference out of the hearing of the jury at that hour must show good cause why the need should not have been anticipated so the jury could have been released early the preceding day and why the conference cannot be deferred until the end of the current day, or at least until the next recess.

12. Short conferences out of the hearing of the jury may be held at the side bar farthest from the jury box. The jury will be sent to the

jury room if a more extended conference out of their hearing is required.

13. The objection of interrogating counsel to an answer that is nonresponsive will usually be sustained. Objections by other counsel solely on the ground that an answer is nonresponsive will usually be overruled. Sustaining such an objection is likely to lead to a new question that elicits exactly the same information as was stated in the struck answer, and time is wasted. Of course, if some other valid ground of objection is added, a statement that the answer was nonresponsive may be needed and appropriate to explain why no objection was made to the question.

14. The court will not instruct a witness to "answer YES or NO" to (1) a multiple question; (2) a question that requires the witness to make or accept an inference or characterization rather than merely acknowledging or denying an observable fact; or (3) a question that is argumentative in form or in substance.

15. Questions framed to have more impact as arguments than as requests for testimony that the witness is competent to give are out of bounds. They will be excluded on objection and may be excluded on the court's initiative, without objection.

16. Ordinarily, questions asking one witness to comment on the credibility of another are out of bounds. A lawyer who wishes to ask such a question must make a request out of the presence of the jury for leave to do so.

C. Schedule

1. The court will aim for conducting this trial 9:00 a.m. to 4:00 p.m. Monday-Friday.

2. There will be no trial of this case on the following days: [Holidays and other days specially committed].

D. Sequestration of Witnesses

If any party so requests, the following rules regarding sequestration will be enforced:

1. A person who is expected to testify as a witness in this civil action must not be present in the courtroom during the presentation of evidence except as follows:

(a) Professional persons engaged by a party or its counsel for the purpose of offering testimony as witnesses having specialized knowledge or experience may be present whenever evidence is being received, unless otherwise ordered.

(b) One representative of each party, designated by counsel to the court in advance of the trial as that party's representative, may be present throughout the trial.

2. A person who has testified and who is not expected to be called again by any party may be present in the courtroom after his or her testimony has been completed, but that person must not state or summarize his or her own testimony or the testimony of others to prospective witnesses.

3. Counsel must not state or summarize the testimony of others to prospective witnesses (other than professional persons within the group described in paragraph V.D.1.(a) above) and must not permit a prospective witness (other than a V.D.1.(a) witness) to read transcripts of prior testimony of other witnesses.

E. Miscellaneous Matters

1. Documents Filed in Court During Trial: A party filing a document in court rather than in the Clerk's Office must file, with the original, a copy of the first page. All documents will be given a docket number by the Clerk.

2. Jurors may be permitted to take notes. If note-taking is allowed, instructions will be given in the form of Exhibit B.

_____

United States District Judge

Each of Parts VI and VII, attached, will apply only if the court specifically so orders.

EXHIBIT A

EXHIBIT MARKING SLIP

The attached document or object is Exhibit No. _____ .

Instructions to the Jury:

You may consider this document or object as evidence only with respect to any party whose name is checked below. You may not consider this document or object as evidence with respect to any party whose name is not checked. If any limited purpose is set forth below then you may only consider this document or object for that limited purpose. If no limited purpose is set forth below, then you may consider this document or object for all purposes as between the parties whose names are checked.

Party	*Limited Purpose*
____ Plaintiff(s)_____	_____
	_____
	_____
	_____
	_____
	_____
____ Defendant(s)_____	_____
	_____
	_____
	_____
	_____
	_____

EXHIBIT B

INSTRUCTIONS TO JURORS ON NOTE-TAKING

Members of the Jury:

You have the permission of the court to take notes during the evidence, the summations of attorneys at the conclusion of the evidence, and during my instructions to you on the law.

In many courts—probably in most—jurors are not permitted to take notes. The reasons are concerned with the fear that taking notes may cause the jury, as a whole, to be less effective in serving as a completely fair and impartial factfinder. Because of the potential usefulness of taking notes, you will be permitted to take notes in this trial. However, for the purpose of protecting against the possible disadvantages that have led many courts to order that notes not be taken, I will instruct you to observe the following limitations:

1. *Note-taking is permitted, not required.* Each of you may take notes. No one is required to take notes.

2. *Take notes sparingly.* Don't try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships.

3. *Be brief.* Over-indulgence in note-taking may be distracting. You, the jurors, must pass on the credibility of witnesses; hence, you must observe the demeanor and appearance of each person on the witness stand to assist you in passing on his or her credibility. Note-taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made the observation itself. Keep in mind that when you ultimately make a decision in a case you will rely principally upon your eyes, your ears, and your mind, not upon your fingers.

4. *Your notes are for your own private use only. Do not use your notes, or any other juror's notes, as authority to persuade fellow jurors.* In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory. On the other hand, you might make an error in observing, and you might make a mistake in recording what you have seen or heard. You are not, therefore, to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

5. *Do not take your notes away from the court.* At the end of each day, please place your notes in the envelope which has been provided to you. A court officer will be directed to take the envelopes to a safe place and return them at the beginning of the next session on this case, unopened. At the conclusion of the case, after you have used your notes in deliberations, they will be collected and destroyed, to protect the secrecy of your deliberations.

/s/
United States District Judge

VI. Time Limits

These provisions regarding Time Limits apply only if the court specifically so orders. The other provisions of this Order Regulating Jury Trial ordinarily assure a trial of reasonable length. The court expects to invoke Part VI only if finding it likely that the trial would be longer than two court days without these provisions.

1. Time limits provide an incentive to make the best possible use of the limited time allowed. If the court finds a need for time limits and the parties are not able to agree upon what the limits will be, the court, after inviting submissions from the parties, will order presumptive limits, which will be subject to modification for good cause shown. Plainly, however, the limits that the court may order will not be as stringent as those the parties might agree would serve their mutual interests in achieving a shorter, less expensive, and better quality trial.

2. Absent agreement of the parties to time limits that are approved by the court, the court will order a presumptive limit of a specified number of hours for this trial, to be allocated equally between opposing parties (or groups of aligned parties) unless otherwise ordered for good cause.

3. A request for added time will be allowed only for good cause. An explicit purpose of this provision is to create an incentive for using time exclusively on issues material to disposition on the merits.

4. In determining whether to allow a motion of any party for an increased allotment of time, the court will take into account (a) whether or not that party has used the time from commencement of trial forward in a reasonable and proper way, in compliance with all orders regulating the trial, (b) the party's proffer with respect to the way in which the added time requested would be used and why it is essential to fair trial, and (c) any other facts the party may wish to present in support of the motion, if determined by the court to be material. The court will be receptive to motions for reducing or increasing allotted time to assure that allotments are fair among the parties and adequate for developing the evidence. Any party that makes only proper use of its time throughout the trial is assured that an extension will be allowed if more time is needed to present all its material and admissible evidence adequately.

5. Presumptive allotments of time to a party will be stated as a total number of hours available to that party, rather than allocations of times for particular witnesses or proceedings. Thus, each party will be free, without a showing of good cause, to allocate time as that party chooses among different uses—opening statement, direct and

cross-examination of various witnesses, closing argument, objections, and motions—as long as the party's total allotment is not exceeded.

6. Time taken to argue objections will be charged against the time allocation of the party against whom the court rules, and will be allocated between parties if the court rules partly for and partly against the objecting party.

7. Not less than *[TWO] WEEKS before the TRIAL DATE*, each party (or group of aligned parties) must serve on the opposing party (or group of aligned parties) and file its NOTICE OF DIRECT EXAMINATION (1) listing its witnesses and an estimate of the time to be used in direct examination of each witness; (2) listing the precise pages and lines of any deposition testimony to be offered during the case in chief, with time estimates for reading that testimony into evidence; (3) affidavits of any expert witnesses whose depositions have not been taken, fairly summarizing the substance of their expected testimony, fully disclosing every opinion to be expressed, and estimating the time of direct examination; and (4) listing all the exhibits it intends to offer and an estimate of time, if any, to be used in publishing each exhibit to the jury. If the expected content of direct examination and exhibits has not previously been disclosed, the NOTICE must include a fair summary of the content of each direct examination and each exhibit.

8. *Not less than [ONE] WEEK before the TRIAL DATE*, each party (or group of aligned parties) must serve and file its NOTICE OF CROSS-EXAMINATION estimating time to be used in cross-examination of each of the opposing party's listed witnesses. If either party, after seeing the opposing party's NOTICE OF DIRECT EXAMINATION, proposes to call additional witnesses or offer additional exhibits, it must, when serving and filing its NOTICE OF CROSS-EXAMINATION, also serve and file a SUPPLEMENTAL NOTICE OF DIRECT EXAMINATION, including time estimates. An opposing party's SUPPLEMENTAL NOTICE OF CROSS-EXAMINATION must be filed not later than TWO COURT DAYS BEFORE THE TRIAL DATE.

9. The parties are encouraged to confer and agree upon witness and exhibit lists and time limits for direct and cross-examination, and to file a stipulation *not less than TWO WEEKS before the TRIAL DATE* in lieu of the separate submissions otherwise required by paragraphs seven (7) and eight (8).

VII. Summary Jury Trial

These provisions regarding Summary Jury Trial apply only if the court specifically so orders.

As a further aid and inducement to serious efforts to settle when doing so is in the best interest of the parties, the court may by special order adopt the practice described in this paragraph. If the case cannot be tried commencing on the TRIAL DATE (because of other matters on the court's docket with priority over this case), a jury will nevertheless be selected on the TRIAL DATE and will be used for a Summary Jury Trial on an afternoon in that week (usually Tuesday), unless good cause is shown that a Summary Jury Trial would not be useful in this case. Parts II-V of this Order do not apply to a Summary Jury Trial. Instead, the Summary Jury Trial will be conducted on the terms and conditions stated in Exhibit C1,[5] unless the parties (with approval of the court) have agreed to other terms and conditions. The parties are encouraged to stipulate to a Summary Jury Trial under Exhibit C2, or to propose any other form that they consider better for this case than Exhibit C1.

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5. Exhibits C1 and C2 are omitted from this Order.